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No. 97-_____

In the

Supreme Court of the United States

October Term, 1997

National Solid Waste Management Association,

Petitioner,

vs.

Charles W. Williams as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey as Director of the Minnesota Office of Environmental Assistance,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the market participant exception cover state regulations that direct the purchasing activities of lesser governmental subunits of the state, when the state does not directly raise the taxes and appropriate the funds for those purchasing activities?

RULE 29 STATEMENT

PARTIES TO THE PROCEEDING

Petitioner National Solid Waste Management Association is a non-profit corporation formed under the laws of Illinois. It is a voluntary trade association of approximately 1700 members who are engaged in the waste hauling, processing and disposal industry.

Respondent Charles W. Williams is named in his capacity as Commissioner of the Minnesota Pollution Control Agency, and respondent Edward Garvey is named in his capacity as head of the Office of Environmental Assistance. Both agencies are part of the government of the State of Minnesota.

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Petitioner National Solid Waste Management Association seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the Eighth Circuit is reported at 146 F.3d 595 (8th Cir. 1998). (App. 1-9.) The district court opinion, which the Eighth Circuit affirmed, is reported at 966 F. Supp. 844 (D. Minn. 1997). (App. 10-29.)

JURISDICTION

The Eighth Circuit issued its decision on June 12, 1998.

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). It raised the Commerce Clause issue presented in this Petition in the first instance before the district court, and the court of appeals addressed that constitutional issue on the merits.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional Provision Involved

"Congress shall have the power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const., art I, § 8, cl. 3 (Commerce Clause).

MINNESOTA STATUTES

Minn. Stat. § 115A.46, subd. 5, as amended in 1995, provides in its entirety as follows:

Subd. 5. **JURISDICTION OF PLAN.** (a) After a county plan has been submitted for approval under subdivision 1, a public entity, as defined in section 16B.122, subdivision 1, within the county may not enter into a binding agreement governing a solid waste management activity that is inconsistent with the county plan without the consent of the county.

(b) After a county plan has been approved under subdivision 1, the plan governs all solid waste management in the county and a public entity, as defined in section 16B.122, subdivision 1, within the county may not develop or implement a solid waste management activity, other than an activity to reduce waste generation or reuse waste materials, that is inconsistent with the county plan that the county is actively implementing without the consent of the county.

Minn. Stat. § 16B.122 defines "public entity" as:

> the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another special taxing district, or any contractor acting pursuant to a contract with a public entity.

Other relevant Minnesota statutes are reproduced in the Appendix. (App. 30-36.)

STATEMENT OF THE CASE

Despite this Court's decision in *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994), invalidating waste designation ordinances, flow control is alive and well in Minnesota. Minnesota law requires local governmental units located in counties that have adopted a preference for waste processing (*e.g.*, composting or incineration) over landfilling to process the solid waste generated by local governmental units even if such disposal is far more expensive than simply sending the waste to an out-of-state landfill. As such, in those counties the state has imposed a regulatory prohibition against landfilling – to the detriment of local governmental units, haulers who have contracted with local governments and the out-of-state landfills that compete with in-state processing facilities. The state does not provide any funding to the local governmental units to pay for the higher disposal costs; rather, local governments must pay the increased costs from their own tax revenues.

Petitioner National Solid Waste Management Association (NSWMA) is a non-profit trade association of companies whose members include numerous haulers and operators of landfills in Minnesota and neighboring states. NWSMA members have contracts with various public entities in Minnesota and are adversely affected by the flow control practices at issue here. Respondent Charles W. Williams is the Director of the Minnesota Pollution Control Agency (MPCA), the state agency charged with enforcing environmental laws and regulations. *See* Minn. Stat. § 116.01 (1996). Respondent Edward Garvey is the Director of the Minnesota Office of Environmental Assistance (OEA), the state agency that must approve the solid waste management plans of local governmental units. Minn. Stat. §§ 115A.055-.12 (1996 and Supp. 1997). Respondents' agencies enforce the state statutory scheme that prevents NSWMA's members

from offering out-of-state disposal services to various local units of government in Minnesota.

In 1980 Minnesota implemented a comprehensive statutory scheme to regulate solid waste disposal.

The genesis of this case is the statutory framework that Minnesota implemented beginning in 1980 to control solid waste disposal. In response to such events as Love Canal in New York, the legislature enacted a regulatory scheme that preferred all other feasible waste disposal options to landfilling. *See* Minn. Stat. § 115A.02(b) (1996). As part of its framework, the legislature required each of Minnesota's 87 counties to develop a waste management plan consistent with the legislature's preferences and to submit their plans to OEA for approval. Minn. Stat. § 115A.46 (1996). Moreover, the legislature has further mandated that solid waste generated in the Twin Cities metropolitan area be processed rather than landfilled. Minn. Stat. § 473.848 (1996).

In response to this legislative initiative, numerous counties and other political subdivisions invested heavily in waste disposal alternatives to landfilling. Resps. Jt. Answer ¶ 10 (P.A. 134-135);[1] *NSWMA v. Williams*, 877 F. Supp. 1367, 1372-73 (D. Minn. 1995). For example, Hennepin County issued "$150,000,000 in bonds for the construction of a 'mass burn' facility which cost $129,000,000 to build." *Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 922 F. Supp. 1396, 1398 (D. Minn. 1996), *aff'd and rev'd in part*, 115 F.3d 1372 (8th Cir.), *cert. denied*, 118 S. Ct. 629 and 643 (1997). Martin and Faribault Counties spent over $8,000,000 to construct a waste composting plant. *Waste Sys. Corp. v. County of Martin*, 985 F.2d 1381, 1387 (8th Cir. 1993).

[1] The abbreviation "App." is to the appendix to this certiorari petition, while "P.A." refers to petitioner's appendix in the appeal below.

Overall, at least 46 of Minnesota's 87 counties, plus one solid waste district, imposed some form of waste processing over landfilling on their residents. *NSWMA*, 877 F. Supp. at 1372.

Minnesota's regulatory scheme authorized flow control.

These new facilities created financial problems for the local governmental entities that built or financed them. Because of the high capital and operating costs of these alternative waste processing technologies, the facilities proved to be uncompetitive with landfills, especially those located out-of-state. *NSWMA*, 877 F. Supp. at 1373; *see* OEA *Solid Waste Fee Report* at 46 (Dec. 1994)(P.A. 88). In 1984, to protect the economic viability of these uncompetitive facilities, and the bonds that financed them, Minnesota implemented a flow control scheme, Minn. Stat. §§ 115A.80-.89, that enabled counties to designate where all local trash had to be hauled. *See Ben Oehrleins*, 115 F.3d at 1376; *NSWMA*, 877 F. Supp. at 1369-70. These ordinances were designed to capture all solid waste within the enacting jurisdiction for processing at the locally preferred facility, regardless of whether such waste was generated by private or public entities. Respondent OEA has to approve the county plans and designation ordinances, while authority to enforce plans once adopted resides in respondent MPCA or the individual counties. *See* Minn. Stat. §§ 115A.034 and 473.811, subd. 5c (1996).

Flow control was struck down.

Through a series of court decisions, a substantial part of this assault on interstate commerce in waste disposal services has been stripped away. In February 1993, the Eighth Circuit found Minnesota's waste designation scheme to be

unconstitutional under the Commerce Clause. *Waste Systems*, 985 F.2d at 1386-89 (county waste designation ordinances "protect in-state economic interests at the expense of out-of-state competitors"). The Eighth Circuit's decision was prescient; one year later, this Court declared waste designation schemes unconstitutional. *Carbone*, 511 U.S. at 386.

After the *Carbone* decision, respondent MPCA abandoned regulatory flow control within the Twin Cities metropolitan area. *See* Consent Decree Modifications and Dismissal of Motions with Prejudice, in *State of Minnesota v. Poor Richard's, Inc.*, No. C5-95-3055, at ¶ IX (Ramsey County Dist. Ct., Nov. 16, 1995) (P.A. 8); *NSWMA*, 877 F. Supp. at 1370. Subsequently, the Eighth Circuit invalidated another aspect of Minnesota's waste designation scheme. In *Ben Oehrleins*, the court held that a county ordinance that required all public and private waste generated within Hennepin County to go to preferred sites violated the Commerce Clause if the waste was intended for out-of-state delivery. 115 F.3d at 1385. For waste generated within the county and intended only for in-state disposal, the court of appeals remanded the case for application of the balancing test adopted in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). 115 F.3d at 1387. These decisions opened the Minnesota market for waste disposal to all parties, including out-of-state landfills. Only Hennepin County waste destined for in-state disposal remained subject to flow control.

Minnesota restores flow control because of local government financial problems.

The opening of the Minnesota market to imported waste disposal services created a financial problem for the counties that had built or financed expensive waste facilities without regard to competitive realities. According to respondent OEA,

"[w]ithout designation ordinances, a number of haulers have chosen to take waste to the least costly option – a landfill – in order to take advantage of the lowest tip fee." OEA, *Solid Waste Fee Report* at 5 (Dec. 1994)(P.A. 86); *see NSWMA*, 877 F. Supp. at 1378. Faced with growing pressure to prop up governmentally financed waste disposal facilities, in 1995 the Minnesota Legislature amended § 115A.46, subd. 5 to control the waste stream being generated by governmental units.

The revisions to Minn. Stat. § 115A.46, subd. 5 effectively eliminated out-of-state competition.

The amendment to Minn. Stat. § 115A.46, subd. 5 enforces the local preferences set forth in the waste management plans that counties had adopted pursuant to the legislative mandate. "[T]here are essentially two waste management methods that can be 'chosen' by a county: waste processing and land disposal." *NSWMA*, 877 F. Supp. at 1372. As respondents, the state agencies who enforce Minnesota waste management practices, explain: "[s]ome county plans require waste to be processed, so all public entities in that county must process their waste using waste-to-energy [*i.e.* incineration] or composting facilities." Resps. Fact Sheet (emphasis added) (P.A. 10). Thus, as it relates to public entity waste from those 46 counties and one solid waste district that have selected processing waste over direct landfilling, Minn. Stat. § 115A.46, subd. 5 mandates compliance with county designation plans, even though the flow control provisions that had once proscribed any out-of-state disposal have been held unconstitutional. *See Waste Systems*, 985 F.2d at 1389.

The 1995 amendment to Minn. Stat. § 115A.46, subd. 5 effectively precludes any meaningful competition for the solid waste generated by all of the local governmental units in

nearly all of the counties and one solid waste district whose solid waste management plans require waste processing. There is only one out-of-state processing facility that competes for the disposal of public waste. Minnesota Office of Waste Management, "Regional Waste Management Capacity," at 9 and App. D pp. 37-38 (P.A. 31 and 70-71). And this LaCrosse, Wisconsin incinerator facility receives waste from no more than four Minnesota counties. *Id.* at 31; Resps. Jt. Answer ¶ 24 (P.A. 138). The cost of constructing competing processing facilities to compete for the waste of Minnesota's government entities is prohibitively expensive. *Waste Systems*, 985 F.2d at 1387. Of course, no landfill can compete at all because processing of waste is first required.[2]

Local units of government have complied with designation.

Respondents' agencies have had a vital role in enforcing the flow control scheme established by Minn. Stat. §

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[2] Under Minn. Stat. § 115A.46, subd. 5, the county can consent to landfilling of waste. Such consent is left to the county's unfettered discretion, but if the county elects to permit landfilling in deviation from its plan, the county must further comply with Minn. Stat. § 115A.471. That provision makes any landfilling contingent upon the public entity determining and managing its potential liability arising from the landfilling, rather than processing, of its waste. In the 46 Minnesota counties whose waste management plans have selected processing, a public entity cannot contract for the landfilling of its waste without receiving the consent of the county under § 115A.46, subd. 5 and satisfying the required liability determination and management imposed by § 115A.471. The expense of satisfying this latter requirement makes the option of landfilling illusory because no local governmental unit now is likely to incur the considerable expense needed to obtain county consent to landfill its waste. *See Waste Systems*, 985 F.2d at 1387 (finding no realistic likelihood that anyone would even apply for exemption from county designation ordinance).

115A.46, subd. 5. Since December 1995, respondents have actively assisted in the implementation and enforcement of Minn. Stat. § 115A.46, subd. 5. Resps. Fact Sheet (P.A. 10-11); Jan. 17, 1996 MPCA/OEA letter to City of Loretto (P.A. 12); Dec. 22, 1995, MPCA/OEA letter to Blue Earth County Environmental Services (P.A. 13-14). Local governmental units are forced to comply with these agency directives. *See, e.g*, Nov. 27, 1996 Scott County Environmental Health Dept. letter to A.W. Disposal. (P.A.15-16, 144-45.) For example, the City of Loretto, which used to permit one of NSWMA's members to use an out-of-state landfill (owned by another NSWMA member), now requires that all Loretto city waste go only to Hennepin County's incinerator. (P.A. 144-45.)

Similarly, the City of Minneapolis terminated its exclusive contract with Waste Management, Inc., an NSWMA member, for out-of-state disposal of the city's very sizable waste stream. Minneapolis did so after Hennepin County sued the city to enforce its designation ordinance, as the county is permitted to do under Minnesota's regulatory scheme. *See* Minn. Stat. §§ 115A.034 and 473.811, subd. 5c (1996); *County of Hennepin v. City of Minneapolis*, No. 95-20294 (Henn. County Dist. Ct.) (P. A. 18-29). To resolve the case, Minneapolis agreed to dispose of all of its solid waste at the Hennepin County incinerator.

With the 1995 amendment to Minn. Stat. § 115A.46, subd. 5, Minnesota closed the door to NSWMA's members offering out-of-state waste disposal services to local governmental units in counties where processing is the preferred disposal method. As a result, as a result these units and their constituents, as well as their haulers, are forced to pay more for garbage disposal. But the parties primarily injured are those against whom the legislation is targeted: the out-of-state landfills. The out-of-state landfills are "prohibit[ed] access to [the public entity] waste." *Ben Oehrleins*, 115 F.3d at 1379; P.A. 144-145. The losses to

petitioner's out-of-state landfill members are substantial. *See Waste Systems*, 985 F.2d at 1387.

To reopen Minnesota's public entity market petitioner brought suit in federal court.

To remedy this injury to interstate commerce, NSWMA sued in federal district court seeking declaratory relief and damages under 42 U.S.C. § 1983. In its lawsuit, NWSMA maintained that the legislative scheme set up in Minn. Stat. §§ 115A.46, subd. 5 and 115A.471 violated the Commerce Clause by barring or restricting the interstate commerce in waste disposal services. Indeed, the adverse impact on interstate commerce was virtually conceded. Nevertheless, the district court ruled for respondents, on the ground that the "market participant" doctrine protected the flow control scheme. In the district court's view, when Minnesota counties, cities or other lesser units of government acted, in legal effect it was the State of Minnesota purchasing waste disposal services. (App. 21-22.) Under the market participant doctrine, the state could, through its local subunits, participate in the waste disposal market however it chose. In addition, the district court found that NSWMA lacked standing to challenge Minn. Stat. § 115A.471 because it was not a public entity covered by that particular statute. (App. 27.)

The Eighth Circuit affirmed. Regarding the Commerce Clause attack, the court followed *Trojan Techs., Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied*, 501 U.S. 1212 (1991), reasoning that the state acts as a market participant when it directs "the purchasing behavior of local governmental units." (App. 8.) The court rejected the contrary view found in *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d 486 (7th Cir. 1984), in which the Seventh Circuit held that the state acts as market regulator when it imposes procurement obligations on local

governments without providing any corresponding financial support to meet those obligations. (App. 8.)

In the Eighth Circuit's view, the political subdivisions that were covered by Minn. Stat. § 115A.46, subd. 5 were "creations of the state which derive their power solely from the state." (App. 8.) Rather than regulating, the state was participating in the market through its political subunits. Citing to *SSC Corp. v. Town of Smithtown*, 66 F.3d 502 (2d Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996), the Eighth Circuit concluded that the state "does not run afoul of the Commerce Clause by dictating by contract where the contractor delivers the waste." (App. 8.) Thus, in enforcing Minn. Stat. § 115A.46, Minnesota was merely acting as a market participant and outside the scrutiny of the Commerce Clause.[3]

REASONS FOR GRANTING THE WRIT

This case presents an issue of critical significance to Commerce Clause jurisprudence: Does the market participant exception cover state regulations that direct the purchasing activities of lesser governmental subunits of the state, when the state neither raises the taxes nor appropriates the money to pay for those purchases? When the Court decided *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794 (1976), it carved out the market participant exception on the premise that a state is entitled to parity with private entities when the state enters the commercial marketplace. *See Reeves, Inc. v. Stake*, 447 U.S.

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[3] The Court of Appeals also affirmed the district court's ruling that NSWMA had no standing to contest enforcement of Minn. Stat. § 115A.471. Petitioner is not contesting that part of the decision below, because invalidating Minn. Stat. § 115A.46, subd. 5 will vitiate Minn. Stat. § 115A.471.

429, 438 (1980)(state as market participant should have treatment accorded private participant).

The decision below departs seriously from that premise. Under the guise of market participation, a state may now insulate from out-of-state competition the purchasing activities of all lesser governmental units. A "Buy Minnesota" requirement will now pass Commerce Clause muster, and all Minnesota cities and counties can be required to purchase only from Minnesota businesses. If the state were truly purchasing those services with funds the state provides, the market participant exception would arguably apply. But here, the taxpayers who are forced to buy more expensive in-state disposal services are paying their taxes to their local governments, not to the state. Hence, the state gets the benefit of the exception without the political burden of levying taxes to fund the purchases. Instead of being free to choose with whom to deal, local units of government are being directed with whom to deal. Economic activity that the market participant doctrine was not intended to cover can now be sheltered from Commerce Clause scrutiny.

There is no doubt that the issue arises in an important context, the handling and disposal of municipal solid waste. The legislative preference for processing waste that Minnesota made in 1980 may have made sense then, but it does no longer. Subsequent federal legislative initiatives have resulted in the closing of unsafe landfills and the opening of environmentally sound ones. *See* 42 U.S.C. § 6944 (1994); 40 C.F.R. parts 257 and 258 (1997). Because they are expensive, state of the art landfills are larger than the obsolete facilities they replaced. Because of the high fixed costs to meet these federal standards, these new facilities have to serve a larger market. As a result, a robust, regional market for waste disposal services has developed. The scheme the

Minnesota legislature adopted in 1980 stands athwart this development.[4]

Minnesota's various efforts at regulating solid waste disposal have been repeated throughout the country. Litigation over flow control has been commonplace, as the courts have been required to set the contours of permissible state regulation of the interstate commerce in waste disposal services. Beginning with *Philadelphia v. New Jersey*, 437 U.S. 617 (1978), this Court has issued five major waste disposal decisions. In each, the Court struck down restrictions on interstate commerce in disposal services.[5] The *Carbone* decision, this Court's most recent pronouncement, should have settled the question of whether flow control ordinances were permissible. With that precedent, expensive government facilities should have begun to stand the test of

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[4] In a report prepared for Congress, the U.S. Environmental Protection Agency debunked the assertion that flow controls, such as are being enforced here, provide an environmental benefit. *See* U.S. Environmental Protection Agency, REPORT TO CONGRESS ON FLOW CONTROLS AND MUNICIPAL SOLID WASTE, EPA 530-R-95-008 (1995). The EPA found "no data showing that flow controls are essential either for the development of new solid waste capacity or for the long term achievement of State and local goals for source reduction, reuse and recycling." *Id.* at III-74. Rather, flow controls simply ensure the financial viability of expensive local incinerators or other types of processing facilities. *Id.* at III-5-54. That purpose stands behind the 1995 amendment to Minn. Stat. § 115A.46, subd. 5.

[5] *See Philadelphia v. New Jersey*, 437 U.S. 617 (1978)(outright ban on landfilling out-of-state waste struck down); *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992)(fee imposed only on out-of-state waste invalidated); *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Resources*, 504 U.S. 353 (1992)(invalidating prohibition on disposing of noncounty waste unless permitted by county waste management plan); *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93 (1994)(additional fees on out-of-state waste struck down); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994)(invalidating flow control ordinance).

the marketplace or be subsidized directly by government appropriations. The era of government manipulation of the waste market should have been over.

The unexpected, contrary result is occurring. By protecting governmentally sponsored facilities with flow control, albeit here limited to public entity generated waste, the decision below undoes what *Carbone* accomplished. And the potential impact on interstate commerce goes well beyond the garbage industry. If left standing, the decision below will authorize states to make an easy end run around the Commerce Clause for a very significant part of the state's economy – the expenditures of local governments. That outcome would push the market participation exemption far off of its logical underpinnings. *See Reeves*, 447 U.S. at 436 ("The basic distinction drawn in Alexandria Scrap between States as market participants and States as market regulators makes good sense and sound law.")

I. The decision below raises an important issue on which there is a clear circuit conflict.

Through the Commerce Clause, the Framers forged a "common market in which state lines cannot be made barriers to the free flow of both raw materials and finished goods in response to the economic laws of supply and demand." *Alexandria Scrap,* 426 U.S. at 803. As Justice Johnson observed long ago, "If there was any one object riding over every other in the adoption of the Constitution, it was to keep the commercial intercourse among the States from all invidious and partial restraints." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 231 (1824) (concurring opinion). The dormant aspect of the Commerce Clause, which prevents states from discriminating against interstate commerce, forestalls the "economic Balkanization" of this country's economy. *Camps Newfound/Owatonna, Inc. v. Town of Harrison,* 520 U.S. 564,

___, 117 S. Ct. 1590, 1599 (1997)(quoting *Hughes v. Oklahoma*, 441 U.S. 322, 324 (1979)). This Court recently described this dormant aspect as perhaps the most important feature of the Commerce Clause. *West Lynn Creamery v. Healy*, 512 U.S. 186, 193 n.9 (1994)(referring to James Madison's comments).

The market participation exception emerged from a narrow line of cases that started with *Alexandria Scrap*. In that case Maryland funded a bounty program to rid the state of abandoned automobiles. Before the state paid the bounty, out-of-state processors had to meet a much more stringent documentation requirement than processors located within Maryland. 426 U.S. at 801. The effect of the documentation requirement was the practical elimination of out-of-state shipments of abandoned automobiles. In affirming the state's right to favor in-state processors, the Court distinguished the bounty program from previously overturned restrictions on interstate commerce. The interstate market for abandoned automobiles still existed, but Maryland's money was keeping most or all of the abandoned automobiles in the state for processing. *Id.* at 810. The Court explained why this disparate treatment was permissible: "Nothing in the purposes animating the Commerce Clause forbids a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others." *Id.* (footnotes omitted).

In *Reeves*, the Court articulated the other premise underlying the market participant exception. Affirming the right of South Dakota to prefer in-state customers of its cement plant, the Court examined the dichotomy between the state as market regulator and the state as market participant. In the former instance, regulations that inhibit interstate commerce are struck down. 447 U.S. at 435. In contrast, when it participates in the market, the state is not regulating the flow of commerce, but merely influencing that flow like

any private entity, with the impact of purchasing dollars. "Evenhandedness suggests that, when acting as proprietors, States should similarly share existing freedoms from federal constraints, including the inherent limits of the Commerce Clause." *Id.* at 439.

The decisions in *Alexandria Scrap* and *Reeves* involved the state directly as the market participant. In *White v. Massachusetts Council of Const. Employers, Inc.*, 460 U.S. 204 (1983), the market participant exception was applied to a political subdivision's expenditure of funds. By executive order, Boston required contractors working on city-funded construction projects to hire city residents for at least one-half of their work forces. The Court readily extended the market participant exception to the city: "Alexandria Scrap and Reeves, therefore, stand for the proposition that when a state or local government enters the market as a participant, it is not subject to the restraints of the Commerce Clause." 460 U.S. at 208 (emphasis added). This statement indicates the Court's view that the exception applied to states and any local governmental units. Critical to this conclusion was the Court's focus on the source of funding: "Insofar as the city expended only its funds in entering into construction contracts for public projects, it was a market participant and entitled to be treated as such under the rule of Hughes v. Alexandria Scrap Corp." *Id.* at 214-15 (citation omitted).

In *Alexandria Scrap, Reeves* and *White*, the Court provided market protection because the governmental units whose conduct was questioned were spending their own tax dollars in the marketplace. That is significant, because for market participation analysis, there is a direct functional connection between the raising and spending of funds. A unit of government, whether state or local, may raise its funds in a variety of ways and exploit its sources of taxes to various degrees. When a unit of government enters the marketplace for goods or services, its taxpayers inherently are agreeing

that the use to which those funds are put is socially beneficial. Moreover, when a governmental unit uses its own funds in the market, it decides with whom it should deal to best meet the goals that the governmental unit seeks. State-mandated purchasing requirements imposed on local governments cut against this connection and undermine the inherent premise of the market participant exception – that governmental purchases that create market demand cannot be seen as interfering with interstate commerce. *See* Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause,* 88 MICH. L. REV. 395, 482-84 (1989)[Coenen]; *see also* Paul S. Kline, *Publicly Owned Landfills and Local Preferences,* 96 DICK. L. REV. 331, 371-74 (1992)[Kline](if state is spending its own funds, then local preferences are less unfair, because directly affected taxpayers pay the expense of preferences and thus have an inherent interest in avoiding misuse). If the notion of parity that underlies the market participant exception still holds, then, like private businesses which spend their own funds, government entities must do so as well to avoid Commerce Clause scrutiny. Private businesses cannot direct how other business entities spend without providing the money to fund mandated purchases.

The Court has never addressed the circumstance presented here – where a superior governmental unit directs how a lesser governmental unit is to spend certain funds. *See Reeves*, 447 U.S. at 437 n.9 (reserving question of legality of "Buy American" programs). The circumstance has, however, been addressed on four occasions by the circuit courts. The result is a clear and irreconcilable conflict among the decisions reached by these courts. The court below followed the analysis of the Third Circuit set forth in *Trojan Techs., Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903 (3d Cir. 1990), *cert. denied,* 501 U.S. 1212 (1991), in which the issue was whether Pennsylvania's "Buy American Steel" law, which

applied to all governmental entities in the state, passed Commerce Clause muster. Though the case involved foreign and not interstate commerce, the Third Circuit held that the market participant exception applied to the state's actions against foreign commerce. The court rejected the Commerce Clause challenge brought by a Canadian manufacturer, holding that the Commonwealth of Pennsylvania was the market participant acting through its local governmental units. *Id.* at 911. These entities were no different than a central state agency. "Both exist only through affirmative acts of the state." Having created these local governmental units, the State could "also restrict the contracting authority of such local bodies." *Id.*

The Ninth Circuit analyzed the issue similarly in *Big Country Foods, Inc. v. Board of Educ. of Anchorage*, 952 F.2d 1173 (9th Cir. 1992). In *Big Country*, a dairy distributor attacked an Alaskan statute that gave a 7% bidding preference to milk produced in-state. The bidding preference for Alaskan milk was upheld because the state was participating in the market through the Anchorage school district. *Id.* at 1179. "Political subdivisions generally exist at the will of the state. A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance." *Id.* (citations omitted). In dicta, the Ninth Circuit rejected the argument of the federal government (a party in the case), that the local school district should be regarded as the market participant because the district was required to grant the bid preference by state law. *Id.* at 1173 n.4.[6]

On the other side of this important issue is the Seventh Circuit. In *W.C.M. Window Co., Inc. v. Bernardi*, 730 F.2d

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[6] *See also Smith Setzer & Sons, Inc. v. South Carolina Review Panel*, 20 F.3d 1311, 1319 (4th Cir. 1994) (endorsing in dicta the reasoning of *Trojan Technologies*).

486 (7th Cir. 1984), the court reviewed a state statute requiring contractors on all public works projects in Illinois to hire only Illinois laborers, unless the contractor certified that qualified residents were unavailable. *Id.* at 489. The Seventh Circuit distinguished between due process and equal protection jurisprudence under the Fourteenth Amendment, when local governmental units are treated as part of a "state," and situations like that presented under the Commerce Clause. *Id.* at 495. Writing for the court, Judge Posner reasoned that when a state enforces local procurement policies without appropriating any funds, the conduct in question is regulation, not market participation. *Id.* at 496. Moreover, he reasoned, there is a quantitative difference between direct state purchases and unfunded purchasing mandates that the state imposes on local governmental units: more governmental purchasing is done by local units of government, and thus more damage can be done to the principles of free trade embodied in the dormant Commerce Clause. *Id.*

All three courts that found market participation expressly considered and rejected the analysis of the Seventh Circuit in *Bernardi*:

Third Circuit:	"Respectfully we disagree. We find no compelling analytical difference between a local governmental unit and central state agencies." 916 F.2d at 911.
Ninth Circuit:	"We agree with the Third Circuit in *Trojan Technologies*." 952 F.2d at 1179.
Eighth Circuit:	"We are persuaded by the reasoning of the Third Circuit." (App. 8.)

The conflict among the circuits is undeniable and irreconcilable. *See* Kline at 418. The local hiring preferences that were struck down in *Bernardi* would have been regarded as market participation in *Trojan Technologies*. Under that decision, the Third Circuit would have deemed the state to be the contracting entity that was requiring American-made steel in its public works projects. Conversely, if the *Bernardi* analysis had been applied to this case, Minnesota's regulatory scheme would have been struck down because the local entities were purchasing the services and signing waste disposal contracts. Under *Bernardi*, when a local governmental unit is told where to purchase disposal services, the state is engaged in market regulation, not participation.

This Court's precedents demonstrate that the Third Circuit's analysis is too simplistic. Under the Eleventh Amendment, a state cannot be sued for money damages, yet a local governmental unit can be. *Edelman v. Jordan*, 415 U.S. 651, 667 n.12 (1974). Likewise, in holding that cities were "persons" under the antitrust laws, this Court observed that "States' subdivisions generally have not been treated as equivalents of the States themselves." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412 (1978). Though the state action antitrust exemption implicates state sovereignty, the Court has refused to extend that exemption carte blanche to states' political subdivisions because of "the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals...." *Id.* at 412-13. Paradoxically, in *Central Iowa Refuse Sys., Inc. v. Des Moines Metropolitan Solid Waste Agency*, 715 F.2d 419, 423-25 (8th Cir. 1983), *cert. denied*, 471 U.S. 1003 (1985), a case that also involved solid waste flow control, the Eighth Circuit discussed at length the justification for distinguishing between states and local governments when applying the state action exemption in

antitrust cases – the implications of which the Eighth Circuit wholly ignored in its decision below.

Though this Court has noted that cities derive their authority from the state, *United Bldg. & Const. Trades Council v. City of Camden*, 465 U.S. 208, 215 (1984), that axiom hardly resolves the issue. A state may perhaps dispense with lesser units of government,[7] but having created and empowered them,[8] these political subdivisions are separate entities that act independently in the commercial marketplace. Cities and counties unquestionably have independent legal status. They may enter into commercial contracts, *see* Minn. Stat. § 471.345 (1996); if they breach a commercial contract, it is the city or county that is legally liable, not the state. The significance of this fact is not that the question presented turns on subtle questions of state law. Rather, the existence of these legal rights of counties and cities – common throughout the country – merely illustrates elementally that where the decision gets made to use taxpayer funds is significant when deciding whether the market participation exception applies. Thus, when a state tells its

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[7] For example, unlike nearly all other states, Hawaii has a unified state school system, with a state-wide elected school board that administers two regional school districts. *See* Haw. Const. art. X, §§ 2 and 3.

[8] While created by the state, in Minnesota there are constitutional restrictions that protect the status of counties and cities. County boundaries may not be changed without voter approval. *See* Minn. Const. art XI, § 3. Home rule government is constitutionally guaranteed, *see id.*, § 4, and commonly used by Minnesota cities and, more recently, counties. *See* Michele Timmons *et al.*, *County Home Rule Comes to Minnesota*, 19 WM. M. L. REV. 811, 823 (1993). Home rule government has been widely adopted throughout the country and is intended to protect the independence of the local government that adopts it. *See, e.g., City of La Grande v. Public Employees Retirement Bd.*, 281 Ore. 137, 576 P.2d 1204, 1207-08 (1978); *Perales v. Heimbach*, 166 A.D.2d 707, 561 N.Y.S.2d 290, 291 (1990) *app. denied*, 77 N.Y.S.2d 913 (1996).

subunits what to do in the commercial marketplace, common sense shows that the command is regulatory, a conclusion reinforced when the source of funding for the procurement mandate is the local taxpayer, not the state. *See* Coenen at 483-84 (forcing municipalities to make purchases they would not otherwise make looks more like regulation than participation); Stanley E. Cox, *Garbage in, Garbage out, Court Confusion about the Dormant Commerce Clause*, 50 OKLA. L. REV. 155, 203 (1997)(the question is whether the state has truly entered the market or merely masked its regulations through purchasing directives).

Thus far, this Court has found market participation only when there was a direct connection between the entity raising and spending the funds. Breaking that direct linkage practically ensures that the protection the waste industry received from *Carbone* will be undone as other states follow the road map drawn by the Eighth Circuit. Moreover, the analysis of market participation the Eighth Circuit employed goes well beyond the waste industry. Every state has its own parochial interests to take care of – "Buy Nebraska beef" or "Buy Massachusetts milk" – could become commonplace purchasing regimes that states could impose on their political subunits. For instance, what Massachusetts failed to accomplish ultimately in *West Lynn* could be revived by legislation that compels public entities like schools to purchase only locally produced milk. That effort would be contrary to the essential function of the Commerce Clause and the Court's recent decisions in *Carbone*, *West Lynn* and *Camps Newfound/Owatonna*.

As Judge Posner noted, there is an analytical difference between the state directing local purchasing and the state actually making the purchases. The fundamental premise to the market participant exception – parity in the marketplace – applies only to the latter. Unfunded purchasing mandates to local governmental units are not market participation, but

regulations that must be subject to Commerce Clause scrutiny.

The impact of the decision below is potentially very large. The prospect of state-mandated purchasing regimes need not stop at disposal services. All governmental procurement within a state could be covered, for nothing in the rationale of the Eighth Circuit's decision prevents that result. In good economic times that prospect may seem unlikely, but in hard times the impulse to protect in-state employment could prove insurmountable. In *West Lynn* this Court was sufficiently concerned about the effects of such economic protectionism – or Balkanization – that it overturned a protectionist regime that had been implemented to aid a troubled industry. The Court should do so here, to prevent the potential harm to the national market that could result if the decision below is left standing.

CONCLUSION

The conflict among the circuits has existed long enough that no further development of the question is needed. The decision below, if left standing, portends a serious erosion of the national market the Framers intended to ensure with the Commerce Clause. The issue is important, and the conflict is irreconcilable. Review by this Court is thus warranted. S. Ct. R. 10 (a). Accordingly, petitioner NSWMA requests that the Court issue a writ of certiorari to review of the decision of the Eighth Circuit in this case.

Dated: September 10, 1998.

Respectfully submitted,

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-2987

National Solid Waste Management Association,	*	
Appellant,	*	
v.	*	Appeal from the United States District Court for the District of Minnesota.
Charles W. Williams, in his official capacity as Commissioner of the Minnesota Pollution Control Agency; Edward Garvey, in his official capacity as Director of the Minnesota Office of Environmental Assistance,	*	
Appellees.	*	

Submitted: March 13, 1998
Filed: June 12, 1998

Before BEAM and HEANEY, Circuit Judges and KOPF,[1] District Judge.

BEAM, Circuit Judge.

The National Solid Waste Management Association (the Association) appeals the district court's[2] grant of summary judgment against it in its action asserting that two Minnesota state statutes violate the Commerce Clause of the United States Constitution Because we find that the Association lacks standing to challenge one statute, and find that the other statute passes constitutional muster, we affirm.

I. BACKGROUND

The disposition of garbage has become a popular subject of Commerce Clause analysis in recent years. See, e.g., Ben Oehrleins and Sons and Daughter, Inc. v. Hennepin County, 115 F.3d 1372, 1376 n.2 (8th Cir.), cert. denied, 118 S. Ct. 629 (1997). This appeal is the latest round in a series of litigation spawned by the State of Minnesota's attempts to control the collection, processing, and disposal of waste. See id. at 1376-77.

Minnesota's legislature enacted the Waste Management Act in an attempt to manage solid waste disposal in that state. Among other things, the Act requires counties to implement comprehensive waste management plans.[3] See Minn. Stat. §§

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[1] The Honorable Richard G. Kopf, United States District Judge for the District of Nebraska, sitting by designation.

[2] The Honorable David S. Doty, United States District Judge for the District of Minnesota.

[3] These county plans must: (1) evaluate the waste generation habits of a county's population; (2) project the amount of waste that will be

115A.46 and 473.803 . Subdivision 5(b) of section 115A.46 (hereinafter "subdivision 5") then requires public entities to manage their solid waste in accordance with the relevant county plan. For example, if the county plan requires that garbage be hauled to a specific facility, all public entities within the county must have their waste delivered to that facility.

If a public entity wishes to act contrary to the county plan, section 115A.47 applies. That section first requires determination of whether the county's designated method is favored over the entity's proposed method according to a statutory list ranking waste management practices. See Minn. Stat. §115A.02(b). If the county's method is preferred, the public entity must (l) determine the potential liability to the public entity and its taxpayers for managing the waste as the entity proposes; (2) develop a plan for managing that potential liability; and (3) submit that information to the state. See Minn. Stat. § 115A.471.

The Association is a non-profit trade association, whose members include Minnesota businesses which have waste collection and disposal contracts with various Minnesota public entities. The Association filed suit, naming Charles Williams, in his official capacity as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey in his official capacity as Director of the Minnesota Office of Environmental Assistance (the state). The Association alleged that subdivision 5 and section 115A.471 both contravene the Commerce Clause of the United States Constitution.

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generated in the county over the next decade; (3) describe programs to assure that the county will meet statutorily established recycling goals; and (4) analyze and propose environmentally preferred means of safely managing the county's projected waste stream. Minn Stat. §§ 115A.46, 115A.55 1, subd.6, 473.803, and 473.811.

The district court granted summary judgment in favor of the state. It held that: (1) subdivision 5 does not violate the Commerce Clause; and (2) the Association lacks standing to challenge section 115A.471.[4] The Association appeals.

II. DISCUSSION

A. Standing

"Standing is the constitutional requirement, imposed by the 'cases or controversies' provision of Article III, that a plaintiff must allege a judicially cognizable and redressable injury in order to pursue a lawsuit." Ben Oehrleins, 115 F.3d at 1378. In order to have standing, the Association must have suffered an injury in fact, must establish a causal connection between that injury and the Minnesota statutes it challenges, and must establish that this injury is redressable by this court. See Steel Co. v. Citizens for a Better Env't, 118 S. Ct. 1003, 1016-17 (1998). Although the Association has met these requirements regarding subdivision 5, we find that it has not met them with regard to section 115A.471.

Subdivision 5 and section 115A.471 both refer to "public entities," but each defines that term differently. Subdivision 5 applies to:

> the state, an office, agency, or institution of the state, the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another

[4] The court also granted summary judgment sua sponte on the Association's claim under 42 U.S.C. § 1983, reasoning that the civil rights claim alleged no constitutional violation. That ruling has not been appealed.

special taxing district, or any contractor acting pursuant to a contract with a public entity.

Minn. Stat. § 16B.122, subd. 1(f) (emphasis added). As "contractors," the Association's members are, therefore, constrained to act in accordance with the applicable county plan when they service the waste produced by their public clients. The statute thus constrains their actions and has consequently caused an injury in fact to the Association's members which can be redressed by this court. Therefore, as the state concedes, the Association has standing to challenge subdivision 5. See Carson v. Pierce, 719 F.2d 931, 933 (8th Cir. 1983) (noting that association has standing as representative of its members).

However) section 115A.47 1 contains a different definition:

> "public entity" means the state; an office, agency, or institution of the state; the metropolitan council; a metropolitan agency; the metropolitan mosquito control district; the legislature; the courts; a county; a statutory or home rule charter city; a town; a school district; another special taxing district; or any other general or special purpose unit of government in the state.

Minn. Stat. § 115A.47 1 (b). Here, there is no mention of contractors acting on behalf of the state. Under the terms of the statute, the Association's members are not public entities and the Association does not contend that it is arguing on behalf of a public entity. Therefore, section 115A.471 imposes no obligations on the Association's members and cannot cause any injury in fact.

In an attempt to establish its claim of injury in fact, the Association submitted an affidavit from one of its members.

The affiant makes the general assertion that the cost to public entities of complying with 115A.471 "dwarf[s] the size of [our] public entity's waste disposal contracts." However, even if this assertion were proved, it would not bolster the Association's position. In order to establish an injury in fact, the Association must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted). The Association has not linked the fact that compliance with section 115A.471 is expensive for public entities with any "concrete and particularized" harm to its members. Id. Although the affidavit reports that all of the business's "pre existing contracts with public entities . . . have since been redrafted" to comply with section 115A.471, there is no allegation that renegotiating these contracts damaged a "legally protected interest." Id. We cannot discern any injury in fact visited upon the Association by section 115A.471. We therefore hold that the Association lacks standing to challenge that statute.

B. Commerce Clause

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. The Commerce Clause has a "negative" or "dormant" aspect which "has long been understood to . . . def[y] the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., Inc. v Department of Envtl. Quality, 511 U.S. 93, 98 (1994). Under the dormant Commerce Clause, statutes that require all waste generated within a geographic area to be disposed of at favored facilities, so-called "flow control ordinances," have been

declared impermissible burdens on interstate commerce. See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, 511 U.S. 383 (1994); Ben Oehrleins, 115 F.3d at 1 384. The Association calls subdivision 5 a "public entities waste flow control law" and asserts that, as flow control, it is invalid.

To ascertain whether a state activity violates the dormant Commerce Clause, we begin by determining whether the state is "regulating" the market or merely "participating" in it. See Reeves, Inc. v. Stake, 447 U.S. 429, 436-39 (1980). If the state activity constitutes only market participation, then the Commerce Clause does not apply and our inquiry ends. See id. To ascertain whether a state is acting as a market participant, we ask "whether the state is actually participating in a narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants." Chance Management, Inc. v. South Dakota, 97 F.3d 1107, 1111 (8th Cir. 1996), cert. denied, 117 S. Ct. 1083 (1997). The state argues that subdivision 5 merely establishes parameters for the state's purchase of waste disposal services. The Association responds that subdivision 5, in constraining the behavior of local government units, regulates the behaviour of market participants other than the state. We have not previously addressed the question of whether a local entity is equivalent to the state for purposes of market participant analysis. Other circuits have split on the issue.

The Seventh Circuit has held that when a state imposes requirements on local government without any state financial support or supervision, the state is not a participant in the project, but a regulator not within the market participant exception. W.C.M. Window Co. v. Bernardi, 730 F.2d 486, 495 (7th Cir. 1984). By contrast, the Third Circuit found "no compelling analytical difference between a local government unit and central state agencies." Trojan Tech., Inc., v. Pennsylvania, 916 F.2d 903, 911 (3d Cir. 1990). "Both exist only through affirmative acts of the state. A municipality

derives its authority from the state." Id. Two other circuits have adopted this reasoning. See Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1319-20 (4th Cir. 1994); Big Country Foods, Inc. v. Board of Educ., 952 F.2d 1173, 1179 (9th Cir. 1992).

We are persuaded by the reasoning of the Third Circuit. In this case, the state is performing as a market participant in directing the purchasing behaviour of local governmental units. Under Minnesota state law, the legislature has unlimited authority over local governmental units. Under Minnesota state law, the legislature has unlimited authority over local governmental units. See Erickson v. Gram, 210 N.W. 616, 616 (Minn. 1926). All of the public entities covered by subdivision 5 are creations of the state which derive their power solely from the state. We are hard pressed to fathom how an entity created by the state, controlled by the state, and subject to the absolute power of the state, should be considered an independent entity when it undertakes to buy waste services on the open market. Public entities should not be considered independent from the state when they contract for the removal of their waste.

When a state contracts for garbage service, it does not run afoul of the Commerce Clause by dictating by contract where the contractor delivers the waste. See SSC Corp. v. Town of Smithtown, 66 F.3d 502, 510 (2d Cir. 1995) ("to the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals -- just as if it were a private party"), cert. denied, 516 U.S. 1112 (1996). Subdivision 5 applies only to the waste generated by public entities and does not reach beyond those parties who, like the Association's members, "are actually and freely dealing with the state in its business enterprise."[5] Chance Management, 97 F.3d at 1112.

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[5] The Association posits in a footnote to its brief that applying the

Because the state's actions here are performed as part of its role as a purchaser of waste disposal services, it is a mere market participant and the Commerce Clause does not apply. The state is, therefore, entitled to summary judgment in its favor on the Association's claims.

III. CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

A true copy.

ATTEST

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

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market participant doctrine to subdivision 5 opens the door to allow counties to resurrect flow control over private generators by simply taking over garbage collection as a public function. Indeed, there is evidence in the record that the Tri-County Solid Waste Management Commission is contemplating just such a step. We are aware that at least one circuit court has held that this would be constitutionally permissible. See Sal Tinnerello & Sons, Inc. v. Town of Stonington, No. 97-7919, 1998 WL 152981 (2d Cir. Apr. 3, 1998). The Supreme Court has recently warned courts to "put aside the natural urge to proceed directly to the merits of [an] important dispute and to settle it for the sake of convenience and efficiency." Raines v. Byrd, 117 S. Ct. 2312, 2318 (1997). Accordingly, we expressly decline any comment on the propriety of a governmental entity assuming public control of all waste disposal within its borders in order to resurrect a previously unconstitutional flow control ordinance.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

National Solid Waste Management Association,

Plaintiff,

v.

Charles W. Williams, in his official capacity as Commissioner of the Minnesota Pollution Control Agency, and Edward Garvey, in his official capacity as Director of the Minnesota Office of Environmental Assistance,

Defendants.

Civil No. 4-96-388(DSD/JMM)

ORDER

Timothy R. Thornton, Esq., Jack Y. Perry, Esq. and Briggs & Morgan, 2400 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402, counsel for plaintiff.

Dwight S. Wagenius, Esq., Beverly M. Conerton, Esq., Minnesota Attorney General, 900 NCL Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 counsel for defendants.

This matter is before the court on plaintiff's and defendants' cross-motions for summary judgment. Based on a review of the file, record and proceedings herein, and for the

reasons stated, the court grants defendants' motion, and denies plaintiff's motion.

BACKGROUND

Plaintiff National Solid Waste Management Association ("NSWMA") is a trade association of companies engaged in providing waste management services. Many of NSWMA's members participate in the movement and disposal of waste in interstate commerce. Plaintiff asserts that its members have waste collection and disposal contracts with Minnesota public entities. Defendant Charles W. Williams is the Commissioner of the Minnesota Pollution Control Agency ("MPCA"), which is the state agency formed to meet "the variety and complexity of problems relating to water. air and land pollution in the areas of the state affected thereby, and to achieve a reasonable degree of purity of water, air and land resources of the state." Minn. Stat. § 116.01. Defendant Edward Garvey is the Director of the Minnesota Office of Environmental Assistance ("OEA"), which provides "technical and financial assistance for development, planning and implementation of state policies related to waste management." Affidavit of Arthur E. Dunn, Deputy Director of OEA; see Minn. Stat. §§ 115A.055-115A.12.

The Minnesota Legislature enacted the Waste Management Act in 1980, codified at Minnesota Statutes, Chapter 115A ("the Act"). The declared goals of the Act are "co protect the state's land, air, water, and other natural resources and the public health by improving waste management," and "to foster an integrated waste management system in a manner appropriate to the characteristics of the waste stream ...." Minn. Stat. § 115A.02(a)(b). The "integrated waste management system" includes a hierarchy of preferences for the management of waste, in descending order of preferences being waste reduction and reuse, waste

recycling, composting of yard waste and food waste, resource recovery through mixed municipal solid waste composting or incineration, and land disposal. Minn. Stat. § 115A.02(b)(1)-(5). The Act requires counties to establish and implement plans addressing the state policies and purposes which are not inconsistent with state law. Minn. Stat. § 115A.46; see Ben Oehrleins v. Hennepin County, F.3d ___ (8th Cir. 1997). In preparing the plans, political subdivisions are required to consult with persons providing solid waste collection, processing, and disposal services. Minn. Stat. § 115A.46, subd. l(d). The plans must be initially approved and then updated and resubmitted for approval every five years. Minn. Stat. § 115A.46, subd. l(e)(f).

The Act also speaks directly to public entities. Minn. Stat. § 115A.46, subd. 5 (describing the "Jurisdiction of Plan"); Minn. Stat. § 115A.471 (describing "Public entities; management of solid waste"). The Act provides for the jurisdiction of a county plan:

> (a) After a county plan has been submitted for approval ..., a public entity ... within the county may not enter into a binding agreement governing a solid waste management activity that is inconsistent with the county plan without the consent of the county.
>
> (b) After a county plan as been approved ... the plan governs all solid waste management in the county and a public entity ... within the county may not develop or implement a solid waste management activity, other than an activity to reduce waste generation or reuse waste materials, that is inconsistent with the county plan that the county is actively implementing without the consent of the county.

Minn. Stat. § 115A.46, subd. 5. A "public entity" is defined as "the state, an office, agency, or institution of the state the metropolitan council, a metropolitan agency, the metropolitan mosquito control district, the legislature, the courts, a county, a statutory or home rule charter city, a town, a school district, another special taxing district, or any contractor acting pursuant to a contract with a public entity." Minn. Stat. § 16B.122, subd. l(f).

In addition, if the public entity enters into or approves a contract for the management of mixed municipal solid waste which would manage the waste using a waste management practice that is ranked lower on the list of preferred waste management practices than the waste management practice selected in the county plan for the county in which the waste was generated, the public entity must: "(1) determine the potential liability to the public entity and its taxpayers for managing the waste in this manner; (2) develop and implement a plan for managing the potential liability; and (3) submit the information from clauses (1) and (2) to the agency." Minn. Stat. § 115A.471. "Public entity" under section 115A.471 is defined more narrowly than under section 115A.26. Under section 115A.471, "public entity" means "the state; an office, agency, or institution of the state; the metropolitan council; a metropolitan agency; the metropolitan mosquito control district; the legislature; the courts; a county; a statutory or home rule charter city; a town; a school district; another special taxing district; or any other general or special purpose unit of government in the state." Thus, the requirements of section 115A.471 do not apply to contractors.

Plaintiff challenges sections 115A.46, subdivision 5, and 115A.471 as in violation of the Commerce Clause. Plaintiff asserts that the statutes restrict the flow of interstate commerce and bar the importation of waste processing services. Plaintiff argues that the statutes are per se "economic protectionist" measures aimed at isolating in-state processing

facilities from the state and national solid waste market, specifically the out-of-state landfills. Plaintiff urges that the statutes are subject to strict scrutiny and that no health, safety or welfare purpose exists for mandating that all Minnesota generated waste from counties with designated waste processing facilities and under contract with a public entity be disposed of at these processing facilities. Plaintiff claims that the sole purpose of the statutes is to favor local processing facilities against all out-of-state landfills. In addition, plaintiff claims that there are several less discriminatory alternatives to sections 115A.46, subdivision 5, and 115A.471, such as imposition of general taxes or institution of a competitive disposal price. Plaintiff's Complaint at ¶¶ 47-56.

The plaintiff's challenge is not the first attack on provisions or implementations of the Act. See Ben Oehrleins v. Hennepin County, ___ F.3d ___ (8th Cir. 1997) (affirming finding that enactment pursuant to §§ 115A.80-.893 was in violation of the Commerce Clause); Waste Systems Corp. v. County of Martin, Minn., 985 F.2d 1381, 1388-89 (8th Cir. 1993) (affirming finding of violation of the Constitution); National Solid Waste Management Assn. v. Williams, 877 F. Supp. 1367, 1379-80 (D. Minn. 1995) (finding § 115A.47 violative of the Commerce Clause); see also C & A Carbone, Inc. v. Town of Clarkstown, NY, 511 U.S. 383, 114 S. Ct. 1677, 128 L. Ed. 2d 399 (1994) (determining that a flow control ordinance violated the Commerce Clause). Plaintiff claims that the discriminatory effect of the statutes at issue in this case is merely a resurrection of designation with a more limited scope; in other words, only the public entity is affected. Thus, plaintiff argues that the out-of-state landfill market is "absolutely excluded from competing for the public entity waste stream." Plaintiff's Memorandum in Support of Motion at 23.

The defendants argue that the statutory provisions challenged in this case do not regulate the conduct of private

persons involved in the waste market and, thus, are unlike the statutes or ordinances at issue in prior cases. The defendants summarize section 115A.46, subdivision 5, by stating that "when a public entity takes on a solid waste management activity, such as garbage collection and disposal or recycling or yard waste management, either using government workers and equipment or hiring contractors to act on behalf of the government, it must do so in a manner that is consistent with certain conditions ... [which] are set out in a county's solid waste management plan." Defendant's Memorandum in Support of Summary Judgment at 4. Defendants also argue that section 115A.471 "does not obligate any entity, private or public, to undertake or refrain from undertaking any waste management practice. Rather, it merely requires public entities to assess and plan for their potential liability if they decide to undertake certain waste management activities." Defendant's Memorandum in Support of Motion at 4.

DISCUSSION

A. Standard of Review

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c). A fact is material if its resolution affects the outcome of the case. There is a genuine of issue of fact if the evidence is such that it could be resolved in favor of either party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Judgment is granted for the moving party if, under the governing law, there can be but one reasonable conclusion as to a jury's verdict. Id.

On a motion for summary judgment, all evidence and inferences are viewed in a light most favorable to the nonmoving party. Adickes v. S.H. Kress & Co., 398 U.S. 144, 158-59 (1970). Nevertheless, the nonmoving party may not rest upon mere denials or allegations in the pleadings, but must set forth specific facts sufficient to raise a genuine issue for trial. Celotex, 477 U.S. at 324. Moreover, if a plaintiff cannot support each essential element of its claim, summary judgment must be granted for the defendant because a failure of proof regarding an essential element
necessarily renders all other facts immaterial. Id. at 322-23. With this standard at hand, the court addresses defendant's motion for summary judgment.

B. The Commerce Clause

The Commerce Clause of the Constitution of the United States provides that "Congress shall have Power ... [t]o regulate Commerce ... among the several States ...." U.S. Const., art. I, § 8, cl. 3. Although the language provides an affirmative grant of power to Congress, the Clause is also recognized as "a self-executing limitation on the power of the States to enact laws imposing substantial burdens on such commerce." Independent Charities of America v. State of Minn., 82 F.3d 791, 798 (8th Cir.) (citing South-Central Timber Dev., Inc. v. Wunnicke, 467 U.S. 82, 87, 104 S. Ct. 2237, 2240, 81 L. Ed. 2d 71 (1984)), cert. denied, 117 S. Ct. 482 (1996). The "negative" or "dormant" aspect is understood to deny "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Oregon Waste Sys., Inc. v. Department of Envtl. Quality of Oregon, 511 U.S. 93, 114 S. Ct. 1345, 1349, 128 L. Ed. 2d 13 (1994); see National Solid Waste Management Ass'n, 877 F. Supp. at 1373 (quoting Oregon Waste Sys.). In essence, the dormant Commerce Clause prohibits economic protectionism

- that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 273, 108 S. Ct. 1803, 100 L. Ed. 2d 302 (1988). However, the courts have drawn a distinction between state regulation of a market and state participation in a market, thereby recognizing that the Commerce Clause does not apply to a market participant. See Chance Management, Inc. v. State of S.D., 97 F. 3d 1107, 1110 (8th Cir. 1996), cert. denied, 117 S. Ct. 1083 (1997); see also Wunnicke, 467 U.S. at 93-95; White v Massachusetts Council of Const. Employers, Inc., 460 U.S. 204, 208, 103 S. Ct. 1042, 1044-45, 75 L. Ed. 2d 1 (1983); Reeves, Inc. v. Stake, 447 U.S. 429, 436-37, 100 S. Ct. 2271, 65 L. Ed. 2d 244 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808-10, 96 S. Ct. 2488, 49 L. Ed. 2d 220 (1976) ("Nothing in the purposes animating the Commerce Clause prohibits a State, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others."). "A state acting as a market participant is free from the strictures of the Commerce Clause because 'there is no indication that the [Commerce] Clause was intended to limit the ability of the [s]tates themselves to operate in the free market.'" Chance Management, 97 F.3d at 11 (quoting Charities, 82 F.3d at 799). The court's inquiry in the market participation cases is whether the state is participating in a narrowly defined market as a proprietor rather than simply regulating the actions of other private market participants. See id. "To the extent that a state is acting as a market participant, it may pick and choose its business partners, its terms of doing business, and its business goals - just as if it were a private party." See Corp. v. Town of Smithtown, 66 F.3d 502, 511 (2nd Cir. 1995), cert. denied, 116 S. Ct. 911 (1996).

1. Section 115A.46, subdivision 5

In this case, defendants assert that section 115A.46, subdivision 5, requiring public entities to comply with county plans, is a self-limiting rather than market-regulating statute. Defendants assert that the statute merely establishes conditions when a public entity, on its own or through contractors, collects or disposes of garbage. Defendants argue that when a public entity collects or manages waste using government workers and equipment, it is performing activities that a private party could perform; in other words, the government is acting in a proprietary function. The defendants assert that in doing so, the public entity may act as an employer contracting for services. Defendants argue that this case is distinguishable from previous cases because, whereas designation applied to all entities, public and private, and to all solid waste residential and business, section 115A.46, subdivision 5 only applies to public entities that manage waste and then only to the waste that the public entity chooses to manage.

NSWMA argues that the statute is a "state-mandated local preference" statute which should not be subject to the market participant exception. In support of its position, NSWMA relies on a Seventh Circuit Court of Appeals decision authored by Judge Posner. See W.C.M. Window Co. v. Bernardi, 730 F.2d 486 (7th Cir. 1984). In Bernardi, the plaintiff challenged an Illinois state statute which required any public works project or improvement for the State of Illinois or any political subdivision, municipal corporation or other governmental unit, to employ only Illinois laborers on such project or improvement, unless laborers were not available or not capable of performing the particular type of work involved. A public school board hired an Illinois corporation to replace some windows; the Illinois corporation then subcontracted the work to an unincorporated association of

Missouri residents, in contravention of the local preference statute. The court determined that the State of Illinois was a regulator and the public entity, the local school board, was the market participant. The market participant exception did not apply to the Illinois preference law. In making this determination, the Seventh Circuit recognized that the window-replacement project was not financed or administered by the state. Instead, "[t]he state [wa]s a regulator telling thousands of local government units that they must not give construction contracts to employers of nonresidents." Id. at 495. In finding that the market participant exception did not apply, Judge Posner reasoned:

> The difference between the state's preferring state residents in its own dealings and forcing local agencies to do so in theirs is both analytical and quantitative. When the project on which the state impresses a home state preference is undertaken by a unit of local government without any state financial support or supervision, the state is not a participant in the project but a regulator. And since more public contracting in the states is done at the local level, by cities, school districts, park districts, counties, etc., than at the state level, extending [the market participant exception] to cases where the state's relationship to its local agencies is purely regulatory could do great damage to the principles of free trade on which the negative commerce clause is based.

Id. at 496. Based on that analysis, plaintiff asserts that the Minnesota statute is regulating public entities rather than acting as a market participant; therefore, NSWMA argues, the market participant exception does not apply.

Defendants assert that for market participation purposes, plaintiff's distinction between the state and subdivisions is

inconsequential. The parties recognize that there is a division among the circuit courts with respect to this issue and that the Eighth Circuit Court of Appeals has not spoken. Defendants urge the court to adopt the analysis of the Third and Ninth Circuits which differ in opinion from the Seventh Circuit. In Trojan Technologies Inc. v. Commonwealth of Pa., 916 F.2d 903, 911 (3d Cir. 1990), certiorari denied, 501 U.S. 1212 (1991), the Third Circuit disagreed with the Bernandi court and found no analytical difference between a local government unit and central state agencies. The Trojan court reasoned that both exist through the affirmative acts of the state, and that a municipality derives its authority from the state. Id. at 911. Because under Pennsylvania law it was clear that the local bodies existed only by state authority and with such powers as the state affirmatively provided, the court saw "no reason why, attendant on making such affirmative grants of power, the Commonwealth may not also restrict the contracting authority of such local bodies." Id. Furthermore, because "imposing such restrictions on central state agencies certainly would be permitted," the court did not "believe restrictions on local bodies stand in any different light." Id.

In Big Country Foods, Inc. v. Board of Education of Anchorage Sch. Dist., 952 F.2d 1173, 1178-79 (9th Cir. 1992), the court addressed the issue of whether the market participant exception could apply to a state statute requiring its political subdivisions to favor state residents in the procurement or sale of goods. The Ninth Circuit likewise disagreed with Bernandi and followed the Trojan court's rationale that political subdivisions generally exist at the will of the state. The Big Country court explained:

> A state should not be penalized for exercising its power through smaller, localized units; local control fosters both administrative efficiency and democratic governance.

> A rule that would consider all political subdivisions as separate from state control for market participant purposes would be anomalous to the proposition that political subdivisions exist at the will of the state. A rule that would consider some political subdivisions as separate from the state controls would lead to difficult case-specific inquiries into the degree of subdivision autonomy.

Id. at 1179; see also Smith Setzer & Sons, Inc. v. South Carolina Procurement Review Panel, 20 F.3d 1311, 1319 (4th Cir. 1994) (agreeing with the Third and Ninth Circuits that the distinction drawn by the Seventh Circuit "simply does not make sense in this constitutional matter"). The Ninth Circuit concluded that the State of Alaska did not impose an impermissible downstream requirement by forcing school districts to enter into contracts on terms set by state requirements, and applied the market participant exception.

Although the Eighth Circuit Court of Appeals has not addressed this issue, this court is guided by the analysis of the Third and Ninth Circuits. This court determines that the application of the market participant exception is not thwarted by the fact that section 153A.46, subdivision 5, places requirements on public entities when they partake in solid waste management activity. In this instance, the statute does not require the public entity to collect or dispose of waste, but when it chooses to do so, it must comply with the county's plan. This court is persuaded by defendants' argument that the state agencies and political subdivisions derive their authority from the state. See e.g., Minn. Const., art. 12, § 3 (providing that the legislature may provide for the creation, organization, administration, consolidation, division and dissolution of local government units and their functions). The logical extension of that relationship between the state and subdivisions, as discussed in Trojan and Big Country,

includes the ability of the state to set parameters for its governmental units as market participants. This court concludes that the fact the conditions in this case are contained in a state statute enacted at the state level as opposed to an ordinance or directive adopted by the local public entity is of no consequence with respect to the application of the market participant exception.

NWSMA challenges this interpretation, however, claiming that the statute goes too far in that the statute specifically refers to "contractors" and affects the conduct of private parties in the market, in contravention of the dormant Commerce Clause. Defendant argue that section 115A.46 is only being applied to contractors through contract provisions or by amendments to existing contracts which the contractor has with the public entity. The Supreme Court addressed similar issues in White v. Massachusetts Council of Construction Employers, 460 U.S. 204 (1983) and in South Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82 (1984). "In both cases, the government reached beyond 'the boundary of formal privity of contract' to influence the economic relationships between its trading partners and other parties." See SSC, 66 F.3d at 514 (quoting White, 460 U.S. at 211 n.7). In White, the Supreme Court upheld an executive order in the City of Boston which required that all construction projects funded by the city were to be performed by a work force consisting of at least fifty percent Boston residents. White, 460 U.S. at 206. In effect, the contractors hired by the city were required to hire half of their workers from Boston. The Supreme Court recognized that "there are some limits on a state or local government's ability to impose restrictions that reach beyond the immediate parties with which the government transacts business," but found it unnecessary to define the limits with precision and stated that:

> [T]he Commerce Clause does not require the city to stop at the boundary of formal privity of contract. In this case, the Mayor's executive order covers a discrete, identifiable class of economic activity in which the city is a major participant. Everyone affected by the order is, in a substantial if informal sense, "working for the city."

White, 460 U.S. at 211 n.7.

In contrast, in Wunnicke, the court examined an Alaskan program which provided for the sale of timber from state-owned forests at reduced prices but which also required at least partial processing of the timber in Alaska prior to it being shipped out of the state. IL. at 84-85. The Supreme Court held that the market participant exception did not apply and recognized that "although the State may be a participant in the timber market, it is using its leverage in that market to exert a regulatory effect in the processing market, in which it is not a participant." Id. at 98. Thus, this court must determine whether section 153A.46, subdivision 5, is more akin to the executive order in White which was subject to the market participant exception, or to the program in Wunnicke which was not.

In urging this court to apply the market participant exception, defendants assert that this case is similar to SSC Corp. v. Town of Smithtown, 66 F.3d 502 (2nd Cir. 1995), certiorari denied, 116 S. Ct. 911 (1996). In SSC, the City of Smithtown, New York, passed a "flow control" ordinance which required all residential and commercial garbage to be disposed of at an incinerator Id. at 505. Smithtown also created a residential garbage collection district and entered into a contract with private garbage haulers to pick up all household garbage in the district. Id. Under the contractual provisions, the haulers were required to take the garbage to the incinerator. Id. The SSC court invalidated the ordinance,

but stated that the central question in determining whether the contract constituted market participation was whether it more closely resembled Boston's local processing requirements in White or Alaska's local-processing requirements in South Central Timber. The Second Circuit determined that Smithtown was a participant in waste collection and waste disposal, and that the town was spending tax dollars to pay for the services, just as Boston was spending tax dollars to pay the salaries of its contractors' construction workers in White. 66 F.3d at 515. The Second Circuit explained:

> If Boston could require contractors for city-funded projects to hire a certain percentage of city residents, then Smithtown can require SSC to hire town residents to drive its garbage trucks - since those truck drivers would be "in a substantial if informal sense 'working for the city.'" [White, 460 U.S.] at 211 n.7, 103 S. Ct. at 1046 n.7. And if Smithtown can require SSC to hire local truck drivers, then it can require the hauler to use local incinerating services as well. It makes no difference in our estimation whether those services are provided by a private company ..., or by a public entity like Smithtown. Because the waste disposal services are "substantial[ly] if informal[ly]" being provided to Smithtown, the town can decide with whom it will deal.

SSC, 66 F.3d at 515.

This court concludes that the statute at issue in this case, which requires contractors hired by the public entities to comply with the county's solid waste management plan, is analogous to the contract requirements placed on the contractors in SSC. The court agrees that the State, through its subdivisions, acts as a market participant in the collection and

management of waste (if the public entity so chooses), and thus may dictate the terms for the collection and management of solid waste, since the contractors are in essence working for the public entity. Although the definition of "public entity" includes "contractors," the statute only applies to contractors who have a contract with a public entity. The inclusion of "contractors" in the definition of "public entity" does not transform the state and its subdivisions from market participants to market regulators, it simply clarifies the role of the contractors when they, as opposed to the public entity itself, collect and dispose of waste on behalf of the public entity. Because the market participant exception applies, the court does not reach the issue of whether the statute has a discriminatory effect on commerce.

2. Section 115A. 471

Plaintiff also challenges section 115A.471, which requires a public entity to do certain things if it chooses to manage waste using a waste management practice that is ranked lower on the list of preferred waste management practices than the waste management practice selected in the county plan. If a public entity decides to deviate from the county's plan by choosing a lesser preferred practice, the public entity must determine its potential liability, develop and implement a plan for managing the potential liability, and submit the information to the agency. See Minn. Stat. §115A.471. Defendants argue that NSWMA does not have standing to challenge section 115A.471.

This court's jurisdiction is limited by Article III of the U.S Constitution, which limits the judicial power of the federal courts to "cases" and "controversies." U.S. Const., art. III, § 2, cl. 1. A threshold question in every case is whether the plaintiff has standing to invoke the jurisdiction of the federal courts. The standing doctrine is "an essential and

unchanging part of the case- or-controversy requirement of Article III." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992); Mausolf v. Babbitt, 85 F.3d 1295, 1301 (8th Cir. 1996) (recognizing that standing requirement is indispensable part of case). To establish standing within the constitutional core requirements of Article III, a plaintiff must satisfy three elements: (1) that plaintiff suffered an injury in fact; (2) that there is causal connection between plaintiff's injuries and the challenged action; and (3) that a favorable decision in the case would likely redress plaintiff's injuries. Lujan, 504 U.S. at 560; Warth v. Seldin, 422 U.S. 490, 508, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975) (placing burden of establishing standing on the party seeking federal jurisdiction). In addition to the constitutional standing requirements, courts have imposed prudential limits on the exercise of jurisdiction. See Ben Oehrleins, ___ F.3d at ___ (concluding that plaintiffs did not have standing based on prudential considerations to assert claims).

The defendants challenge plaintiff's standing in the context of a summary judgment motion. In Lujan, the Supreme Court reiterated the magnitude of a plaintiff's burden depending upon the stage in the proceedings:

> The party invoking federal jurisdiction bears the burden of establishing [the standing elements]. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we

> presum[e] that general allegations embrace those specific facts that are necessary to support the claim. In response to a summary judgment motion, however, the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence "specific facts," Fed. R. Civ. Proc. 56(e), which for purposes of the summary judgment motion will be taken to be true. And at the final stage, those facts (if controverted) must be supported adequately by the evidence adduced at trial.

Lujan, 504 U.S. at 561 (internal case citations and quotations omitted).

The court will first address the constitutional minima required by Article III. The injury-in-fact element requires more than a cognizable interest; rather, NSWMA must sufficiently allege that its members are directly affected by the statute. See Sierra Club North Star Chapter v. Browner, 843 F. Supp. 1304, 1309 (D. Minn. 1993) (citing Lujan v Defenders of Wildlife, 504 U.S. 555 (1992). As discussed, the Minnesota Legislature did not similarly define "public entity" under section 153A.471 and section 115A.26. subdivision 5. "Public entity" under section 153.471 does not include a "contractor acting pursuant to a contract with a public entity." Compare Minn. Stat. § 115A.26, subd. 5 (defining "public entity" pursuant to section 16B.122, which includes contractors acting pursuant to contracts with a public entity), with Minn. Stat. § 153A.471 (defining "public entity" without the inclusion of contractors). Plaintiff is not a "public entity" as defined under section 115A.471 and does not contend that it is raising its arguments on behalf of a public entity. In short, section 115A.471 does not impose any requirements or burdens on the plaintiff which could be perceived as an injury in fact under the constitutional standing requirements.

This determination is underscored by the plaintiff's submissions to the court. A member of the association submitted an affidavit on behalf of plaintiff stating that "the costs of complying with these statutory requirements would be prohibitively expensive. Such liability determination and management would cost tens of thousands of dollars. This cost would in most, if not all, cases dwarf the size of [our] public entity[] waste disposal contracts." Affidavit of Sandra Lee Roskowiak, Vice President of Randy's Sanitation, at ¶ 2. Plaintiff did not substantiate its cost predictions or show an injury in fact. Even as to the speculated injury, there is no evidence that such losses are due to the requirements placed on public entities under section 115A.471.

In this instance, the court determines that NSWMA has failed to come forth with sufficient evidence of an injury in fact to satisfy the constitutional minima for standing to challenge section 115A.471. Because plaintiff lacks standing under Article III's requirements, the court need not address the prudential limitations on standing.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that defendants' motion for summary judgment is granted; and plaintiff's motion for summary judgment is denied. Plaintiff's action is dismissed with prejudice.[6]

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[6] The court recognizes that the parties did not move for summary judgment on count II of plaintiff's complaint which asserts a violation of section 1983 of Title 42, a statute creating no substantive rights, but providing a remedy when rights secured by federal law or the Constitution are deprived under color of state law. Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922, 924, 102 S. Ct. 2744, 73 L. Ed. 2d 482 (1982). An underlying constitutional right must exist before a cause of action under section 1983 will lie. Plaintiff must show that defendants violated a right, privilege or immunity protected by the Constitution or laws of the United States. Because the court has determined that no violation of the

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 19, 1997

David S. Doty, Judge
United States District Court

Commerce Clause exists and because that is the only other claim asserted in the complaint, the court also dismisses plaintiff's section 1983 claim.

115A.02 LEGISLATIVE DECLARATION OF POLICY; PURPOSES.

(a) It is the goal of this chapter to protect the state's land, air, water, and other natural resources and the public health by improving waste management in the state to serve the following purposes:

(1) reduction in the amount and toxicity of waste generated;

(2) separation and recovery of materials and energy from waste;

(3) reduction in indiscriminate dependence on disposal of waste;

(4) coordination of solid waste management among political subdivisions; and

(5) orderly and deliberate development and financial security waste facilities including disposal facilities.

(b) The waste management goal of the state is to foster an integrated waste management system in an manner appropriate to the characteristics of the waste stream and thereby protect the state's land, air, water, and other natural resources and the public health. The following waste management practices are in order of preference:

(1) waste reduction and reuse;

(2) waste recycling;

(3) composting of yard waste and food waste;

(4) resource recovery through mixed municipal solid waste composting or incineration; and

(5) land disposal.

115A.03 DEFINITIONS.

* * *

Subd. 25. **Processing.** "Processing" means the treatment of waste after collection and before disposal. Processing

includes but is not limited to reduction, storage, separation, exchange, resource recovery, physical, chemical, or biological modification, and transfer from one waste facility to another.

* * *

For the purpose of this section, waste is "unprocessed" if it has not, after collection and before disposal, undergone at lest one process, as defined in section 115A.03, subdivision 25, excluding storage, exchange, and transfer of the waste.

115A.46 REQUIREMENTS.

Subdivision 1. **General.** (a) Plans shall address the state policies and purposes expressed in section 115A.02 and may not be inconsistent with state law.

(b) Plans for the location, establishment, operation, maintenance, and postclosure use of facilities and facility sites, for ordinances, and for licensing, permit, and enforcement activities shall be consistent with the rules adopted by the agency pursuant to chapter 116.

* * *

(e) Plans must be submitted to the director for approval. When a county board is ready to have a final plan approved, the county board shall submit a resolution requesting review and approval by the director. After receiving the resolution, the director shall notify the county within 45 days whether the plan as submitted is complete and, if not complete, the specific times that need to be submitted to make the plan complete. Within 90 days after the a complete plan has been submitted, the director shall approve or disapprove the plan. If the plan is disapproved, reasons for the disapproval must be provided.

* * *

115A.471 PUBLIC ENTITIES; MANAGEMENT OF SOLID WASTE.

(a) Prior to entering into or approving a contract for the management of mixed municipal solid waste which would mange and waste using as waste management practice that is ranked lowed on the list of preferred waste management practices in section 115A.l02, paragraph (b), than the waste management practice selected for such waste in the county plan for the county in which the waste was generated, a public entity must:

(1) determine the potential liability to the public entity and its taxpayers for managing the waste in this manner:

(2) develop and implement a plan for managing the potential liability; and

(3) submit the information from clauses (1) and (2) to the agency.

(b) For the purpose of this subdivision, "public entity" means the state; an office, agency, or institution of the state; the metropolitan council; a metropolitan agency; the metropolitan mosquito control district; the legislature; the courts; a county; a statutory or home rule charter city; a town; a school district; another special taxing district; or any other general or special purpose unit of government in the state.

115A.80 DESIGNATION OF SOLD WASTE MANAGEMENT FACILITIES; PURPOSE.

In order to further the state policies and purposes expressed in section 115A.02, and to advance the public purposes served by effective solid waste management, the legislature finds and declare that it may be necessary pursuant to section 115A.80 to 115A.89 to authorize a qualifying solid waste management district or county to designate a solid waste processing or disposal facility.

473.801 DEFINITIONS.

Subdivision 1. **Terms.** For the purposes of section 473.801 to 473.849, the terms defined in this section have the meanings given them.

Subd. 2. **Local government unit.** "Local government unit" means any municipal corporation or governmental subdivision other than a metropolitan county located in whole or part in the metropolitan area, authorized by law to provide for the processing of solid waste.

Subd. 3. **Agency.** "Agency" means the Minnesota pollution control agency.

Subd. 4. **Application.** Unless otherwise provided the definitions of terms in section 115A.03 shall apply to section 473.801 to 473.845.

Subd. 5. **Director.** "Director" means the director of the office of environmental assistance.

Subd. 6. **Office.** "Office" means the office of environmental assistance.

473.803 METROPOLITAN COUNTY PLANNING.

Subdivision 1. **County master plans; general requirements.** Each metropolitan county, following adoption or revision of the metropolitan policy plan and in accordance with the dates specified therein, and after consultation with all affected local government units, shall prepare and submit to the direction for approval, a county solid waste master plan to implement the policy plan. The master plan shall be revised and resubmitted at such times as the metropolitan policy plan may require. The master plan shall be revised and resubmitted at such times as the metropolitan policy plan may require. The master plan shall described county solid waste activities, functions, and facilities; the existing system of solid waste generation, collection, and processing, and disposal within the county; proposed mechanisms for complying with the recycling requirements of section115A.551, and the

household hazardous waste management requirements of section 115A.96, subdivision 6; existing and proposed county and municipal ordinances and license and permit requirements relating to solid waste facilities and solid waste generation, collection, and processing, and disposal; existing or proposed municipal, county, or private solid waste facilities and collection services within the extent to which such facilities and services will or may be used to implement the policy plan; and any solid waste facility which the county owns or plans to acquire, construct, or improve together with statements as to the planned method, estimated cost and time of acquisition, proposed procedures for operation and maintenance of each facility; an estimate of the annual cost of operation and maintenance of each facility; an estimate of the annual gross revenues which will be received from the operation of each facility; an estimate of the annual gross revenues which will be received from the operation of each facility; and a proposal for the use of each facility after it is not longer needed or usable as a waste facility. The master plan shall, to the extent practicable and consistent with the achievement of other public policies and purposes, encourage ownership and operation of solid waste facilities by private industry. For solid waste facilities owned or operated by public agencies or supposed primarily by public funds or obligations issued by a public agency, the master plan shall contain criteria and standards to protect comparable private and public facilities already existing in the area from displacement unless the displacement is required in order to achieve the waste ma agement objectives identified in the plan.

473.811 COUNTIES AND LOCAL UNITS OF GOVERNMENT; WASTE MANAGEMENT.

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Subd. 5a. **Ordinances; solid waste facilities.** Each metropolitan county shall by ordinance establish and from time to time revise rules, regulations and standards for sold waste facilities within the county, relating to location, sanitary operation, periodic inspection and monitoring, maintenance, termination and abandonment, and other pertinent matters. The county ordinance may require facilities accepting mixed municipal sold waste for disposal to install scales. The county ordinance may prohibit disposal facilities from accepting unprocessed mixed municipal solid waste for final disposal. The county ordinance shall require permits or licenses for solid waste facilities and shall require that such facilities be registered with a county office.

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Subd. 5c. **County enforcement.** Each metropolitan county shall be responsible for insuring that waste facilities, solid waste collection operations licensed or regulated by the county and hazardous waste generation and collection operations are brought into conformance with, or terminated and abandoned in accordance with, applicable county ordinances; that operator or owners or both of such facilities or operations shall be responsible to the county for satisfactorily performing the procedures required. If operators or owners or both fail to perform, the county may recover the costs incurred by the county in completing the procedures in a civil action in any court of competent jurisdiction, or in the discretion of the board, the costs may be certified to the county auditor as a special tax against the land. The

ordinances may be enforced by action in district court or administrative penalty order authorized under section 116.072. The county may prescribe a criminal penalty for the violation of any ordinance enacted under this section not exceeding the maximum which may be specified for a misdemeanor.

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473.848 RESTRICTION ON DISPOSAL.

Subdivision 1. **Restriction.** (a) For the purposes of implementing the waste management policies in sectino115A.02 and metropolitan area gals related to landfill abatement established under this chapter, a person may not dispose of unprocessed mixed municipal solid waste generated in the metropolitan area at a waste disposal facility unless the waste disposal facility meets the standards in section 473.849 and:

(1) the waste has been certified as unprocessible by a county under subdivision 2; or (2)(i) the waste has been transferred to the disposal facility from a resource recovery facility;

(ii) no other resource recovery facility serving the metropolitan area is capable of processing the waste; and

(iii) the waste has been certified as unprocessible by the operator of the resource recovery facility under subdivision 3.

(b) For purposes of this section, mixed municipal sold waste does not include street sweepings, construction debris, mining waste, foundry sand, and other materials, if they are not capable of being processed by resource recovery as determined by the council.

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